IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 5227 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?No

2. To be referred to the Reporter or not?
No

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
No

5. Whether it is to be circulated to the Civil Judge?
No

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JOITARAM K PATEL

Versus

STATE OF GUJARAT

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Appearance:

MR RAMESH K SHAH for Petitioner

Mr. P.B. Bhatt, APP, for Respondent No. 1

MR S.D. Patel for Respondent No. 2

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CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 27/01/98

ORAL JUDGEMENT

The petitioner, by way of filing this application under Section 482 of the Code of Criminal Procedure ('Code' for short), has prayed to quash the complaint filed by respondent No.2 against the petitioner, and the criminal proceedings, being Criminal Case No.1255 of 1997, pending before the learned Judicial Magistrate, First Class, Vadodara.

Respondent No.2 filed the complaint before the learned Judicial Magistrate, First Class, Vadodara, alleging that he is the Proprietor of Radhe Milk Supply, and he was having business relation with M/s. Radhekrishna Dairy Products Private Limited, Ahmedabad. The petitioner, Joitaram K. Patel, was the Director of M/s. Radhekrishna Dairy Products Private Limited. Because of business relationship with the petitioner, the complainant had rendered financial help to the petitioner to the tune of Rs.4 lakhs. It is further alleged in the complaint that the petitioner had given cheque to the complainant, bearing No.445385, dated September 7, 1996, for an amount of Rs.4 lakhs, drawn on Manekchowk Cooperative Bank Limited, of Vatva Branch, Ahmedabad. As per the complaint, when the cheque was deposited for realisation, it came to be returned with endorsement 'stop payment' on November 26, 1996. Thereafter, immediately, the complainant contacted the petitioner on phone, when, it was conveyed that, because of shortage of funds, the cheque may not be deposited until the first week of February 1997. It is further alleged in the complaint that, it was assured by the petitioner on phone that, the petitioner would be having sufficient funds in the account and, therefore, the complainant can deposit the cheque in the first week of February 1997, and the cheque will not be bounced back. The complainant has further alleged that, relying upon the assurance given by

the petitioner, the said cheque was deposited again on February 7, 1997 in the Bank. But, on the second time also, the cheque was returned with endorsement 'stop payment' on February 10, 1997. The said intimation was sent by the Banker of the complainant on February 14, 1997. It is alleged in the complaint that, in fact, there was no sufficient fund in the account of the petitioner and, therefore, in the guise of 'stop payment', the said cheque was not cleared. It is further alleged that on February 17, 1997, the complainant has sent a statutory notice, through his advocate, by registered A.D. post, to the petitioner about the dishonour of the cheque in question. The said notice was received by the petitioner on February 17, 1997, but was not replied by the petitioner and, therefore, on March 29, 1997, the complainant filed the complaint before the learned Judicial Magistrate, First Class, Vadodara, for the offences punishable under Section 138 of the Negotiable Instruments Act, 1981 ('Act' for short) against the petitioner. After verifying the contents of the complaint, the learned Judicial Magistrate, First Class, Vadodara, took cognizance of the offences and issued process against the petitioner, which order is challenged by the petitioner by way of filing this Criminal Misc. Application under Section 482 of the Code.

It is contended in this application that the cheque in question was stolen and, therefore, a public notice to that effect was published in the daily newspaper, Gujarat Samachar, on August 9, 1996 and, thereafter, the Bank of the petitioner was instructed to 'stop payment' of the above cheque. The case of the petitioner is that there are dues of Rs.9 lakhs to be recovered from the original complainant and, therefore, they have filed Summary Civil Suit No.1265 of 1997 in the City Civil Court, at Ahmedabad. It is the further contention of the petitioner that no offence under Section 138 of the Act is made out, as the complaint is time barred.

Learned advocate, Mr. R.K. Shah, appearing for the petitioner, has submitted that the cheque in question was stolen and, therefore, by letter dated August 7, 1996, the petitioner had instructed the Manekchowk Cooperative Bank Limited, Vatva Branch, to 'stop payment' of the said cheque. It is further submitted that a public notice to that effect was published in the daily newspaper, Gujarat Samachar, on August 9, 1996. The above submission of the learned advocate for the petitioner is devoid of any merit. The cheque in

question was issued on September 7, 1996, whereas the intimation to the Bank by the petitioner about the cheque having been stolen is dated August 7, 1996. The cheque in question was drawn in favour of the complainant. As per the intimation given to the Bank, the said cheque was found missing from the cheque book. Prima facie, it appears that the story about cheque found missing/stolen is got up with a view to escape liability under Section 138 of the Act, on the guise of cheque being lost or stolen. The petitioner had managed with the Bank to stop payment of the cheque in question.

The learned advocate for the petitioner has further submitted that, in view of the decision of the Supreme Court in the case of Electronics Trade & Technology Development Corporation Limited, Secunderabad vs. Indian Technologists & Engineers (Electronics) (P) Limited, reported in (1996) 2 SCC p.739, if the drawer, before presentation of the cheque, issues notice to the payee not to present the same for encashment, and he still presents it, then S.138 is not attracted, if the cheque is returned by the Bank. Relying upon the aforesaid decision, the learned advocate for the petitioner has further submitted that, as the said cheque was stolen, the Bank was given 'stop payment' instruction and, therefore, the petitioner had not committed any offence under Section 138 of the Act. The submission of the learned advocate for the petitioner is devoid of any merit. In instant case, as observed earlier, the petitioner has made out a false story about stolen cheque and the intimation has been given by the petitioner to the Bank to 'stop payment' of the cheque in question. It becomes clear from bare perusal of the averments made in the complaint and the cheque annexed with the complaint, that the cheque was drawn in favour of the original complainant (respondent No.2 herein). Under the circumstance, the petitioner ought to have given notice to the drawee of the cheque, namely, the complainant, not to present it for encashment. However, no such notice was given to the complainant not to present the cheque for encashment. On the contrary, when the cheque was first deposited in the Bank and when it was returned with endorsement 'stop payment', the complainant had contacted the petitioner, and the petitioner had assured the complainant that the cheque might be deposited in the first week of February 1997, and, relying upon that assurance, the complainant had again presented the cheque for encashment. On the second presentation also, the cheque was returned by the Bank with the same endorsement 'stop payment' on February 14, 1997. The complainant had given statutory notice through his advocate to the

petitioner, which was received by the petitioner on February 17, 1997, but was not replied by him. If really the cheque was lost and the petitioner had intimated the Bank to stop payment, the petitioner should have given reply to the complainant about the cheque having been lost and the resultant effect of 'stop payment'. No such steps were taken by the petitioner. It appears that, just to get out from the clutches of the offences under Section 138 of the Act, the petitioner had made out a false story of cheque having been lost or stolen.

The decision rendered by the Supreme Court in Electronics Trade & Technology Development Corporation Limited, Secunderabad (supra), has been explained by the Supreme Court in its later judgment, in the case of K.K. Sidharthan vs. T.P. Praveena Chandran and another, reported in (1996) 5 Supreme Court Cases 369. Simple advance intimation not to present the cheque, without making arrangement for sufficient funds in the account, would not exonerate the drawer from the criminal liability as contemplated under Section 138 of the Act. The advance intimation not to present the cheque should contain detailed sufficient and legally tenable reasons. Otherwise, anybody by giving cheque would induce somebody to act on it and, without making arrangements of funds, would simply inform the payee not to deposit and would get rid of liability. To say so is to encourage dishonesty and frustrate the object of Section 138 of the Act. If the drawer after issuance of cheque informs the drawee for not presenting the cheque for encashment without sufficient detailed and legal tenable reasons/grounds and without making arrangement for sufficient funds in his account, in my opinion, one has to raise statutory presumption that the cheque was given with dishonest intention to induce the payee to act on it and thus shall be deemed to have committed offence under Section 138 of the Act.

The object of Section 138 is to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. Despite civil remedy, Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a bank and induce the payee or holder in due course to act upon it. Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly. Once the cheque has been drawn and issued to the payee and the payee has presented the cheque and thereafter, if any instructions are issued to the bank for non-payment and the cheque is returned to

the payee with such an endorsement, it amounts to dishonour of the cheque and it comes within the meaning of Section 138.

In my view, the decision in the case of Electronics Trade & Technology Development Corporation Limited, (supra), relied upon by the learned advocate for the petitioner, would not come to his rescue in holding that no offence under Section 138 of the Act is made out. On the contrary, the principles laid down in the case of K.K. Sidharthan (supra) would apply in all fours to the facts of the present case, as the petitioners, without any detailed reasons for instructing 'stop payment', and without making any arrangement for sufficient funds in his account, had tried to get out from the clutches of the offence under Section 138 of the Act. Even otherwise, if the cheque was stolen, or missed from the cheque book of the petitioner, it raises serious disputed question of fact, which cannot be gone into in this application, which is filed under Section 482 of the Code. This disputed question of fact cannot be decided merely on affidavit. The petitioner can very well raise this plea before the concerned Magistrate, who had issued process against the petitioner for the abovestated offence.

It is further argued by the learned advocate for the petitioner that complaint under Section 138 of the Act is clearly barred by limitation. This submission of the learned advocate for the petitioner is also devoid of any merit. The cheque in question was, in the second time, at the request of the petitioner, presented by the complainant on February 7, 1997 and he was informed by his Bank on February 14, 1997 that the cheque was returned unpaid with endorsement 'stop payment'. The complainant, on the same day, i.e., on February 14, 1997, had given statutory notice, through his advocate, to the petitioner, which was received by the petitioner on February 17, 1997, but was not replied by the petitioner. After serving the statutory notice, the complaint was lodged on March 29, 1997, which is within the period of limitation as prescribed under the Act. In this connection, a reference deserves to be made to the ruling of this Court in the case of Ghanshyam M. Swamy vs. M/s. Classic Steel Products & Others, reported in 1991 (2) G.L.R. 1075, wherein it is held as under:

> "Clause (b) of Section 142 refers by incorporation to clause (c) of Sec.138. Under clause (c) of the proviso to Sec. 138, 15 days period is given by way of grace to the drawer to honour his commitment as

> per the cheque. It is quite clear that one month's period referred to in clause (b) of Sec. 142 shall be reckoned only from the end of 15th day as provided in clause (c) if at all the complainant has issued the notice. If he does not issue any notice, there cannot be any cause of action and therefore the issuance of notice is a must."

As per the principle laid down in the case of Ghanshyam M. Swamy (supra), the complaint is to be filed within one month from the date of end of 15th day of the statutory notice, i.e. 17th February 1997 plus 15 days = 4th March 1997. Admittedly, the complaint filed under Section 138 of the Act is on March 29, 1997, which is clearly within the period of limitation as prescribed under the Act.

The ground raised by the petitioner in this application, for quashing criminal proceedings in exercise of power under Section 482 of the Code, is found to be, not only, baseless, but also, the ground, on which the complaint is challenged, appears to be dishonest. It is the settled principle of law that the court should be at loath in exercise of powers under Section 482 of the Code, and such powers should be exercised in the rarest of rare cases. The grounds stated in the application involve disputed questions of fact, which cannot be gone into by this Court in the inherent exercise of its powers.

As a result of foregoing discussion, I do not find any substance in this application and this application is dismissed. Rule is discharged. The ad-interim relief stands vacated.

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(swamy)